(3)

No. 03-1434

Supreme Court, U.S.
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In The Supreme Court of the United States

NIELS LAUERSEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner prays to this Honorable Court for relief by rehearing from the denial of his Writ of Certiorari on May 17, 2004.

This petition for rehearing of the order denying the petition for a Writ of Certiorari is being filed within the 25-day limitation and complies with the form and filing requirements of Supreme Court Rule 44.

I. Intervening Circumstances of a Substantial and Controlling Effect.

A. New and conflicting decision by another Court of Appeals.

The United States Circuit Court of Appeals for the Third Circuit has removal in the following cases. Owens Corning, Third Circuit No. 03-4212; W.R. Grace & Co., Third Circuit No. 03-4526; USG Corp., Third Circuit No. 04-1468; (See: In Re: Kensington International Limited and Springfield Associates, LLC, Third Circuit No. 03-4212 Opinion Filed May 17, 2004)

This removal was granted due to conflicts of interest by some of the advisors in these cases. These are three of the most complex Chapter 11 cases in the United States. The cases involve billions of dollars in liabilities for asbestos personal injuries and have been delayed due to the circuit panels decision of whether the District Court Judge could preside over them.

Commercial creditors moved to unseat Judge Wolin in 2003, arguing that some of his independent advisors were playing partisan roles in another big asbestos Chapter 11 case. This fact caused a taint in the Judge's rulings.

The Circuit panel stated nothing in the record demonstrated that Judge Wolin was actually biased, but the threat of perception of bias was enough to require his disqualification.

The circuit Court still has to decide the recusal issue in two similar Chapter 11 cases. Armstrong World Industries Inc.; Federal - Mogul Global Inc.; (See: In Re: Kensington International Limited and Springfield Associates, LLC, Third Circuit No. 03-4212 Opinion Filed May 17, 2004)

A motion and appeal for recusal has been filed in the Armstrong case with the court's decision to be decided.

United States District Court Judge Wolin said the move to oust him was driven by the desire of some creditors to head off a ruling that could reduce their recovery significantly.

Circuit panel Judge Julio M. Fuentes stated in his dissent that creditors "employed a guerrilla tactic timed to serve their own economic interests." Judge Fuentes said the disqualification wipes out two years of action in the Owens Corning case and required retrial of the key points in the Chapter 11 proceeding, due to terminate in 2004.

B. The Recusal Issue is unsolved.

This Honorable Court needs to vacate the denial in Lauersen 03-1434 and grant certiorari due to the conflict between and within the circuit court. The recusal issue continues to plague the courts of the United States due to non-uniformity of decisions.

Chase Manhattan Bank v. Affiliated FM Insurance Company, 343 F.3d 120 (2nd Cir. 2003) decided in opposition to Lauersen one-week earlier shows absolutely this disparity even within a circuit.

The most important issue is the Due Process violation that is found when a criminal defendant has the right to a fair trial by an unbiased judiciary violated due to a conflict of interest issue being resolved by the presiding Judge. The Third Circuit resolved these civil cases due to the appearance of impropriety, and the threat of perception of bias was enough to require disqualification.

The Chase case relates this standard of review for the Court's abuse of discretion under statutory disqualification. Reviewing the relevant statutory provisions Title 28 U.S.C. §455(a) provides:

> (a) Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

This provision governs circumstances that constitute an appearance of partiality, even though actual partiality has not been shown. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860 (1988). The Circuit Court continues, "the determination of whether such an appearance has been created is an objective one based on what a reasonable person knowing all the facts would conclude. See id. at 860-61. See also, Liteky v. United States, 510 U.S. 540, 548 (1994) (noting that section 455(a) requires an 'objective' evaluation of a potentially disqualifying interest, and that 'what matters is not the reality of bias or prejudice but its appearance.'"

C. Issue of National Importance

This important and recurring nature of the judicial recusal issue is constantly being fought in the nation's court and covered in the national media.

The most prominent case involves Supreme Court Justice Scalia's conflict of interest involving going on a hunt with Vice President Cheney shortly after this Court granted certiorari in a case involving the vice president.

Congresspersons and newspaper editorials called for Justice Scalia to recuse himself from the case, which involves whether Vice President Cheney must reveal information about an energy policy task force he headed. The host of the hunting trip is a prominent member of the energy industry.

Justice Scalia refused to recuse himself claiming he remains impartial and likened the trip to a White House dinner.

Complicating this matter, Vice President Cheney's press secretary said Justice Scalia's objectivity is "really a question that the Supreme Court officials are in better position to answer. This is really, at its core, a question about how the court operates, what their rules are and so forth."

The issue is whether any judge should have a financial interest with an interested party to a current litigation. This includes expenses paid for on a hunting trip or even going out to dinner with an interested party, even to the White House. Vice President Cheney, even though not a nominal party to this litigation, has a strong personal and political interest in the result.

Similarly, District Court Judge Pauley had a financial interest in a restitutionary insurance company victims in Lauersen upon which the government's litigation was based.

Justice Scalia's 21-page memorandum in which he scoffed at the notion that he would not be impartial in deciding the case involve his longtime friend Vice President Cheney wrote: "If it is reasonable to think that a Supreme Court justice can be bought so cheap, the nation is in deeper trouble than I imagined." The memo citing his decision for recusal in a recent case involving States providing scholarships for secular study but to exclude theology students stated he will step out of a case when "I have said or done something" that warrants it. Scalia states in lower courts, a judge who steps aside from a case can be replaced by another judge, but not at the Supreme Court.

D. Recusal Standard Needed.

This Honorable Court needs to review Lauersen 03-1434 to set a standard for all courts in the United States. This standard needs to be per-se objective and take any recusal decision out of the hands of the individual justice being recused.

The Scalia decision was subjective with every disputed issue regarding his impartiality being decided by himself in his own favor. This has the appearance of impropriety discussed in Title 28 U.S.C. §455(a) and is in violation of the Due Process Clause of the Fifth Amendment. Likewise, District Court Judge Pauley's decision to not recuse himself due to his minuscule ownership of stock and annuities in a restitutionary insurance corporate victim is a subjective decision, biased in further conflict of interest with the outcome of the recusal motion, on top of the entire case.

It would have been more reassuring to the public and concerted party if the entire court had rendered the recusal decision for Justice Scalia instead of a self-written memo. Similarly another District Court Judge, removed from the Lauersen case, could have given an objective separate decision of the recusal motion in Lauersen.

It is not for Justices, even Supreme Court Justices, to decide at what price they individually will consider what amount may affect their partiality in a given case. This subjective standard is what gives rise to inconsistent decisions to all courts due to no standard having been set from above.

This Honorable Court needs to set a standard that a Judge must follow no matter what his conception personally. The issue is whether an objective observer would consider what matter is not the reality of bias or prejudice, but its appearance.

A standard allowing a Supreme Court Justice to decide for himself or herself is logically incorrect since if the final decision ends up tied, the lower court decision can stand. Or in the alternative the Court could have an alternate appointed by its rules for this very uncommon situation. The current standard allows each judge to decide on their own whether they themselves perceive that a conflict of interest exists. This is the problem in Lauersen and many other cases. This Honorable Court needs to vacate the denial of certiorari in Lauersen to set this standard of national importance.

The public policy concerns of this case are enormous considering the political, religious and economic overtones that will be determined based on the outcome. Even the Government in its authority under the United States Attorney and its office being subject to appointment by the

reigning political parties, whom are influenced by donations of insurance companies, further mandates the concern of the judicial officer presiding over the litigation to determine the liberty interest of this doctor defendant. The restitutionary recovery and future economic liability for payments by these same insurance companies further complicates this issue. The judge is economically tied to the outcome of this private interest and the public policy involved.

E. Other Prominent Cases.

District Court Judge Pollack in the Chase case is not a rare occurrence for financial conflict of interest. District Court Judge Robert Sweet owned $250,000.00 of Tyco International when assigned to the Security and Exchange case against Ex-Tyco CEO Dennis Kozlowski. District Court Judge Richard Casey recused himself from a $10 million dollar asbestos case involving General Electric, which he owned $50,000.00 worth of stock. This is a very small percentage of GE's worth. District Court Judge Richard Berman owned $15,000.00 worth of Microsoft stock and approved a settlement agreement in the case in July 2002. Berman also owned $50,000.00 in E-Bay while sitting on a suit by actor Jerry Orback against E-Bay for display of his Social Security number on their website. The Judge apologized for any possible oversight and stated he diligently tried to monitor his stocks for conflicts. District Court Judge Frederick Block owned $50,000.00 of Motorola stock while sitting on a personal injury case he dismissed against Motorola in 2000. All these judges had financial conflicts despite a computerized program in use to detect these conflicts.

State Supreme Court Judge Diamond owned stock in and had other ties to JP Morgan Chase and ruled in the banks favor in a foreclosure proceeding. State Supreme Court Justice Shirley Kornreich refused to recuse herself

from the same case until "The Post" reported she was being investigated by the FBI. Four more Justices recused themselves on the same case.

District Court Justice Hittner lost $40,000.00 of Enron stock he owned and sold it before presiding over the Lea Fostow case. Here the Judge sold his holding prior to sitting on the case and presents the issue of conflict for post holdings and any financial ramifications they may have on the appearance of impropriety. The Judge rejected her initial plea agreement.

The FBI is looking at documents that Manhattan Supreme Court Judge Franklin Weissberg had financial ties to two companies whose board members included Ronald Perelman's most trusted lieutenants, while presiding over Perelman's divorce proceedings.

These cases show how urgent a standard needs to be set by this Court. Interference by the threat of the FBI or Department of Justice in not acceptable as a standard in this Country. The problem cries out for review.

This Honorable Court has granted review in this situation in Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 34 n. (1929). Clark v. Manufacturers Trust Co., 337 U.S. 953, 338 U.S. 241 (1949); United States v. Ohio Power Co., 353 U.S. 98 (1957).

II. New and Controlling Supreme Court Decision and Cases Still Pending.

A. Blakely v. Washington, U.S., No. 02-1632, argued 3/23/04

The enhancements issues in Lauersen are related to the same issue in Blakely still pending before this Honorable Court. The issue is whether the enhancements made by a

judge sua sponte without a jury determination violate the Fifth and Sixth Amendment as delineated in Apprendi v. New Jersey, 530 U.S. 466 (2000).

Apprendi defends the core concept establishing that a trial jury must find all facts known to exist in order to subject a defendant to a legally prescribed punishment. The issue has been considered harmless error by all circuit courts in relation to United States Sentencing Guidelines enhancements. This Honorable Court is presently deciding whether these enhancements are constitutional and whether they violate the standard enunciated in Apprendi. Id.

Dr. Lauersen was enhanced from a level 6 to level 33 by the Court sua sponte without a jury determination after his jury trial. The petitioner requests his petition for rehearing be held until the decision in Blakely settles the issue in June 2004.

B. Schriro v. Summerlin, U.S. No. 03-526, argued 4/19/04

The Supreme Court is currently deciding the issue in Schriro that is related to Lauersen and also involves the denial of the Fifth and Sixth Amendment rights enunciated in Appendi Id.

The issue of whether the decision in Ring v. Arizona, 536 U.S. 584 (2002) applies retroactively to death penalty prior determinations by the court rather than jury, is the same related issue to jury determination for elements of an offense being decided by the Court or jury.

Lauersen was raised from $150,000.00 to $4.9 million dollars sentencing exposure at the whim of a judge without this monetary element determination by a jury. This dramatically increased his sentence in violation of his

constitutional rights. This violated the Due Process of the defendant at trial in raising his U.S.S.G. exposure by a lesser standard of proof-preponderance of the evidence by a judge, versus beyond a reasonable doubt standard determined by a jury.

Petitioner requests this Honorable Court hold this rehearing decision until the Schriro cases is determined in June 2004. This Honorable Court has granted petitions for rehearing on intervening circumstances of new and controlling Supreme Court decisions. Fuentes v. United States, 516 U.S. 1022 (1995); Friend v. United States, 517 U.S. 1152 (1996). This Honorable Court has granted a petition for rehearing in cases of the same or related issues that have come before the Court and are still pending. Simmons v. Sea Land Services Inc., 459 U.S. 931 (1982); Forgett v. United States, 383 U.S. 926, 390 U.S. 203 (1968).

The Petitioner respectfully requests this Honorable Court vacate the denial of his petition for Writ of Certiorari decision and grant certiorari for briefing or in the alternative, summarily remand to the lower court to act accordingly with present and future Supreme Court precedent and authority.

CERTIFICATE OF PRO SE PETITIONER

Petitioner pro-se certifies that the above petition for rehearing is presented in good faith and not for any delay and is restricted to the grounds specified in Rule 44.2.

Respectfully Submitted,

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